STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
V	No. 295027 Genesee Circuit Court
BRYAN CHARLES ADAMS, Defendant-Appellant.	LC No. 09-024587-FH

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of operating a motor vehicle under the influence of intoxicating liquor ("OUIL"), third offense, MCL 257.625(1). The trial court sentenced defendant to 36 months of probation. For the reasons set forth below, we affirm.

A. REQUEST FOR REPLACEMENT COUNSEL

Defendant argues that the trial court erred when it denied his request for new counsel. We review a trial court's decision regarding the substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court abuses its discretion when it reaches a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). As this Court explained in *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005):

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.

Here, defendant never established good cause for substitution of counsel or that there was a difference of opinion with respect to a fundamental trial tactic. Instead, defendant merely recited a litany of reasons why he felt uncomfortable with his trial counsel, all of which are unpersuasive. Defendant complained that this was defense counsel's first trial. However, there

is no requirement that a defendant receive representation by an experienced trial lawyer, only a competent one. See *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001). Defendant also asserted that he had requested discovery of evidence, witnesses, and statements, but defense counsel replied that he provided all of this discovery to defendant.

Though defendant maintained that he had not received a dash cam video from the police, no such evidence exists because the Flint police vehicles involved with this traffic stop did not have dash cam video cameras. Defendant further asserted that defense counsel had not fully investigated a fingerprint technician who would testify about certain admissions attributed to defendant. However, the prosecutor stated that the fingerprint technician would be called only to testify about issues related to fingerprints, not matters involving any admissions made by defendant.

Defendant claimed that counsel should have obtained his vehicle identification number, the relevancy of which is unclear, but, in any case, defense counsel did get the number from defendant's vehicle. Finally, defendant maintained that defense counsel never procured a witness, Rashonda Haines, to testify at trial. However, trial counsel and defendant admitted that this witness was in Kentucky and, after exerting due diligence, efforts to locate her and bring her to Michigan were unsuccessful.

In sum, none of defendant's concerns related to any difference of opinion with respect to any fundamental trial tactic and all of his complaints were either irrelevant or properly addressed by counsel. Because defendant did not meet his burden of showing good cause, the trial court did not abuse its discretion when it denied defendant's request for substitute counsel.

B. OUT-OF-COURT, SIGNED STATEMENT

Defendant argues that the trial court erred when it failed to admit a notarized letter from Rashonda Haines. A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

We hold that the trial court correctly excluded the letter as hearsay. Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. MRE 801; *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). Hearsay is generally not admissible unless a recognized exception applies. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). The catchall is codified both under MRE 803(24) (availability of declarant is immaterial) and MRE 804(b)(7) (declarant is unavailable):

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the

> adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The most important requirement is the first one, that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions. *People v Katt*, 468 Mich 272, 291; 662 NW2d 12 (2003).

Here, the proffered statement is devoid of any guarantees of trustworthiness. Some relevant factors to consider the trustworthiness of a statement include the following:

> (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made, and (8) the time from within which the statements were made. [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004).]

Here, the proffered statement was prepared by an acquaintance of defendant for the sole purpose of this trial. It was not spontaneously made, and the motive to fabricate is self evident. Additionally, defendant cannot meet the MRE 803(24)(B) or MRE 804(b)(7)(B) requirement that the statement be more probative on the point for which it is offered than any other evidence. Defendant testified that the license plate was working when he picked up the vehicle, which is what Haines stated in her letter. Thus, the proffered statement is not more probative than what defendant already entered into evidence.

Because the statement lacks any indicia of reliability and the statement is not more probative than any other evidence available to defendant, the trial court did not abuse its discretion when it failed to admit the statement.

C. LEGALITY OF TRAFFIC STOP

Defendant argues that the traffic stop was illegal and the trial court should have suppressed everything resulting from the stop. "To the extent a lower court's decision on a motion to suppress is based on an interpretation of law," review is de novo, but any factual findings are reviewed for clear error. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). In addition, a trial court's ultimate ruling with regard to a motion to suppress is reviewed de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

The Michigan Constitution and the United States Constitution guarantee that a person shall be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Traffic stops by police officers are considered seizures; thus, an automobile stop is subject to the constitutional requirement that it not be "unreasonable" under the circumstances. *Whren v US*, 517 US 806, 809-810; 116 S Ct 1769; 135 L Ed 2d 89 (1996). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 810; see also *People v Kazmierczak*, 461 Mich 411, 419 n 8; 605 NW2d 667 (2000); *People v Chapo*, 283 Mich App 360, 366; 770 NW2d 68 (2009);

Davis, 250 Mich App at 363. Probable cause exists "where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

Here, Officer Richard Vickrey testified that he pulled defendant over because he saw that defendant's license plate light was not working, which is a civil infraction, MCL 257.686. Defendant tried to establish that the stop was illegal by showing that the plate light was working six days later. However, even if defendant is correct regarding the status of the light six days later, that fact does not prove that the light was working on the night of the arrest. MCL 257.686 requires that the light be bright enough such that the license plate is "clearly legible from a distance of 50 feet." Defendant's testimony did not address this requirement, while Officer Vickrey testified that he was 25 feet behind defendant and did not see the light functioning. The trial court found Officer Vickrey credible and found that the officer acted in good faith. There is nothing on the record to suggest that this finding was clearly erroneous. Accordingly, Officer Vickrey had probable cause to effectuate the traffic stop.

Defendant's argument that the malfunctioning light was merely a pretext is not persuasive because an officer's subjective motive is irrelevant as long as the officer had probable cause to believe that a traffic violation existed. *Whren*, 517 US at 813; *Davis*, 250 Mich App at 363. Accordingly, because the police officer had probable cause to believe that defendant was in violation of the plate light civil infraction, the traffic stop was legal.

D. ADMISSION OF PRIOR CONVICTIONS

Defendant argues that he is entitled to a new trial because of the wrongfully admitted testimony of the officer in charge. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not object and we review unpreserved issues for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Furthermore, reversal for unpreserved matters is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

It is undisputed that, even when a defendant is charged with OUIL, third offense, evidence of prior drunk driving convictions is inadmissible because the prior offenses are sentence enhancements and not substantive elements that need to be proved to the jury. *People v Weatherholt*, 214 Mich App 507, 510-511; 543 NW2d 34 (1995). Accordingly, these prior convictions would be considered like any other evidence of prior crimes, which are not admissible to "prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). These past acts are admissible if offered for a "proper purpose," which is one other than establishing a defendant's character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005).

Defendant cites the testimony of Officer Richard Besson during the following exchange with the prosecutor:

> *Q.* Can you briefly tell the Jury what it means to be the Officer in Charge of a case?
>
> *A.* Ah, my assignment in the traffic division as a day shift sergeant would be to handle, um, all OUIL – or drunk driving intoxication, ah, arrest. They would come across my desk, and I would give, ah, attention to each one as they needed. In this case it was a third offense; meaning that there was a prior alcohol event, ah, charged. I would have to, um, obtain prior convictions for, and then would have to obtain a warrant, ah through a prosecutor.
>
> *Q.* Are you also in charge of, ah, keeping the records for the data master breathalyzer?
>
> *A.* Yes, ma'am.

This was the only reference to defendant's prior convictions. The prosecution does not suggest that the evidence was offered for any proper purpose and simply argues there was no intention to elicit this evidence.

Defendant is not entitled to relief on this issue because there is no indication that defendant was actually innocent or that the introduction of this evidence undermined the fairness, integrity, or public reputation of the trial. The statement was an isolated statement that was never referenced again. Thus, any impact of the statement was vastly diminished. Defendant admitted that he drank several beers over the course of a few hours and proceeded to drive. Defendant also admitted that he took two breathalyzer tests at the police station after his arrest. The result of each breathalyzer test was 0.15, which was well in excess of the legal limit of 0.08.[1] Thus, the evidence was overwhelming of defendant's guilt. Accordingly, even though the introduction of the evidence of the past convictions was prohibited, defendant is not entitled to a new trial.

E. DATAMASTER TICKET

Defendant claims that the DataMaster output, which is the breathalyzer ticket generated after testing, should not have been admitted into evidence because, after the output was generated by the machine, hand-written notations on the output transformed the document into an inadmissible police report.

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[1] MCL 257.625(1)(b) provides that a person is under the influence of alcohol if the person has an alcohol content of 0.08 grams or more per 210 liters of breath.

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *Aldrich*, 246 Mich App at 113. Defendant objected to admission of the test report, but he only objected on, what can best be described as, authentication or foundation grounds.[2] Therefore, the hearsay issue that defendant raises on appeal is not preserved. This unpreserved issue is reviewed for plain error affecting substantial rights. *Hawkins*, 245 Mich App at 447.

As a threshold matter, a DataMaster ticket, showing the results of a breathalyzer test, generally is admissible. MCL 257.625a(6)(b)(ii); See *People v Dinardo*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294194, issued October 10, 2010), slip op, pp 3-7. However, defendant claims that the ticket, transformed into a "police report," is inadmissible under MRE 803(6), the business record exception to hearsay, and MRE 803(8), the public record exception to hearsay. Defendant is correct that police reports are generally inadmissible hearsay. *People v McDaniel*, 469 Mich 409, 412-413; 670 NW2d 659 (2003). Assuming arguendo that the modified DataMaster output was, indeed, a police report, it simply means that the document was not admissible through exceptions MRE 803(6) or MRE 803(8). This does not preclude its admissibility through other avenues.

None of the extraneous statements on the ticket were necessarily offered to prove the truth of the matter asserted; thus, they are not hearsay. MRE 801. The DataMaster *ticket* was admitted to show that defendant's test results were 0.15, which was above the legal limit of 0.08. Any writings were incidental to the ticket itself.

Aside from being nonhearsay, another avenue for the admission of most of these notations would be through the present sense impression exception. MRE 803(1) provides that a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is an exception to hearsay. Here, Lieutenant Darwin Sparks made the following hand-written notations to the DataMaster ticket: (1) "6 to 8 beers" was added; (2) "good health" was added; and (3) "mouth checked" was added. The first two entries were a mere transcription of defendant's own admissions. Lieutenant Sparks said that in response to being asked, defendant stated he had "6 to 8 beers." Lieutenant Sparks also said that defendant stated he was in "good health." Lieutenant Sparks then wrote defendant's answers on the ticket, which meets the requirements for a present sense impression. The written statements described an event (defendant talking) while the Lieutenant was perceiving the conduct or immediately thereafter. See *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). And this situation does not involve multiple layers of hearsay, MRE 805, because the initial layer, defendant speaking, is not hearsay because it is an admission of a party opponent. MRE 801(d)(2). But the third notation, "mouth checked," does not readily

[2] Defense counsel at one point stated, "I was questioning . . . the *reliability* of the document based on this (inaudible)." (Emphasis added.) Defense counsel also stated, "I object. . . . [N]o foundation[']s been laid for it."

appear to fall under a recognized hearsay exception because it appears to be Lieutenant Sparks's out-of-court statement that he checked defendant's mouth before administering the tests.

Regardless of the introduction of any evidentiary error, defendant is not entitled to relief. The authentication of the DataMaster test itself is not seriously disputed. Defendant admitted that he took the breathalyzer test at the police station. Thus, even if all or some of the extraneous markings were considered inadmissible, it would not have prevented defendant's test results of 0.15 from being introduced. Moreover, all of the information that was written on the DataMaster ticket was also properly introduced through testimony at trial, making it purely cumulative.[3] Accordingly, defendant cannot show how any evidentiary error affected a substantial right, and his unpreserved claim fails.

F. JURY INSTRUCTION

Defendant argues that the trial court erred when it instructed the jury regarding consciousness of guilt. The prosecution contends that defendant waived the issue by expressing satisfaction with the instructions. We agree with the prosecution. "A party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Not only did defendant fail to object to the jury instruction, defendant waived the issue by expressly approving the instructions. *Chapo*, 283 Mich App at 372-373.

Waiver of an issue will extinguish any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver has been defined as the "intentional relinquishment or abandonment of a known right." *Id.* (internal quotations and citations omitted). The doctrine of waiver is presumed to be applicable in both constitutional and statutory provisions. *Id.* at 217-218. Here, defendant expressed to the trial court, "The defense is satisfied with the instructions, your Honor."

In *Carter*, the defendant's counsel was asked if there was any comment regarding the court's ruling regarding a jury instruction, and counsel replied, "Satisfaction with that part of it, Judge." *Id.* at 212. The Court in *Carter* found it dispositive that the defendant's counsel "expressed *satisfaction* with the trial court's decision." *Id.* at 215 (emphasis added). "*[E]xpressly approv[ing]* the trial court's response . . . constitutes a waiver that *extinguishes* any error." *Id.* at 216 (emphasis in original). This is different from mere forfeiture, where there is only a failure to object. *Id.* at 215-216. Therefore, here, given defense counsel's express satisfaction with the instructions, defendant has waived the issue, thereby extinguishing any error.

G. SITE VISIT BY JURY FOREMAN

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[3] Lieutenant Sparks testified that defendant admitted to drinking six to eight beers and being in good health. Lieutenant Sparks also testified that he checked defendant's mouth before running the DataMaster tests.

Defendant argues that the jury foreman's visit to the scene of defendant's arrest is a basis for a new trial. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

A defendant has a right to a fair and impartial jury, and consistent with this, "jurors may only consider the evidence that is presented to them in open court." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). When a jury considers extraneous facts not introduced at trial, it could deprive a defendant of his constitutional rights. *Id.*

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. . . . The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [*Id.* at 88-89 (citations and footnotes omitted).]

Defendant clearly met the first requirement by showing that the jury foreman visited the scene of the arrest before rendering a verdict. Thus, the next question is whether the site visit created a real and substantial possibility that affected the verdict. We conclude that the visit did not.

The jury foreman emphatically stated that, while visiting his sister or performing some work-related task, he just happened to be near the area of defendant's arrest. He stated that he was not looking at anything in particular when he was there. More importantly, the foreman also stated that nothing he saw influenced his own decision, nor did he share what he saw with any other jurors. When asked if he had noticed a discrepancy between defendant's testimony regarding the distances involved and the distances he observed in person, the foreman said that his site visit did not provide him any new information – he already knew of the discrepancy from his own personal experiences.

Defendant claims that the foreman's conduct and own calculations prejudiced him because defendant's credibility on these issues was the "decisive issue" at trial. To the contrary, defendant's credibility had very little to do with the trial. Defendant's guilt was established by the breathalyzer tests, on which he scored 0.15. The fact that defendant claimed that some collateral events happened differently than portrayed by the police is of little consequence. Accordingly, any extraneous influence on the jury foreman, either through his already-existing personal knowledge or the site visit, did not create a real and substantial possibility of affecting the verdict.

H. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at various times during the trial. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Unpreserved issues of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Davis*, 250 Mich App at 368.

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant contends that his trial counsel was ineffective by not producing a witness for trial. The witness in question was in Kentucky at the time of trial. The record shows that the witness was "unavailable" with "no possible way to get up [to Michigan.]" Defendant does not explain how an attorney performing at an "objective standard of reasonableness" could have circumvented this impossibility. A defendant cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims." *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009). Accordingly, this claim fails.

Defendant maintains that his counsel was ineffective by failing to object to the officer in charge's reference to defendant's prior convictions. As noted in Part C, *supra*, this evidence was inadmissible. However, as our Supreme Court recognized, "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel may have believed that it was better to not draw attention to this isolated, unsolicited statement, which attributed prior drunk driving convictions to defendant. As a result, defendant has failed to overcome the strong presumption that counsel engaged in sound trial strategy. *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008). Assuming arguendo that defense counsel's performance was deficient, defendant cannot meet the second requirement of showing a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. As discussed in Part C, *supra*, even if the testimony

was not admitted into evidence, the substantive evidence against defendant was overwhelming. Thus, a timely objection would not have impacted the jury's guilty verdict.

Defendant further claims that his trial counsel was ineffective when he failed to object to the jury instructions involving evidence of consciousness of guilt. The trial court instructed the jury as follows:

> *[THE COURT]:* There has been some evidence that the defendant tried to – and I want to make sure I use the right terminology here, tried to run away after or during the time the police were trying to arrest him. This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilty [sic]. You must decide whether the evidence is true, and if true whether it shows that the defendant had a guilty state of mind.
>
> And can you identify what that's in reference to, just so the –
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> *[THE PROSECUTOR]:* Actually Judge, if we could approach?
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> *THE COURT:* Yes.
>
> [Bench Conference Held]
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> *THE COURT:* And in having the side-bar discussion, I think that instruction is more related to – possible two possibilities, the allegation of a conscience state of a guilty mind, which has to do with the claim about the false names at the police station and all of that kind of thing and then of course, prior to the actual arrest when the – when it's alleged that he turned into this parking lot where there was supposed to be a building and I think there was some allegation that he may have tried to get out of the car. So that's what that's in relation to. And you have to decide, using your common sense whether or not that either connotes a guilty state of mind as it relates to the police department issues or whether there was an attempt to run based on what occurred at the time that he went behind the building. That's for you to decide at this point as a factual matter.

Defendant avers that the evidence adduced at trial "did not support the inference that [defendant's] decision to turn left into a parking lot rather than stop by the side of the road was an attempt to hide or flee from justice." However, a fair reading of the instruction does not represent what defendant maintains. The instruction was not given based on defendant's conduct in turning left and driving behind a building. Rather, the instruction provided context for when defendant attempted to leave his vehicle on foot. Thus, defendant's argument is unavailing. "Evidence of flight is admissible to support an inference of consciousness of guilt." *Unger*, 278 Mich App at 226 (internal brackets and quotations omitted). Moreover, the fact that defendant did not actually flee is not dispositive. *Id.* "[I]t is always for the jury to determine whether evidence of flight occurred under such circumstances as to indicate guilt." *Id.* Here, evidence showed that defendant not only turned left when pulled over, which was unusual by itself, but also pulled behind a vacant building and attempted to get out of his vehicle before the officer

approached. This evidence is sufficient to allow a jury, if it wishes, to infer that defendant intended to flee.

Additionally, it is well-settled that a jury may infer consciousness of guilt from evidence that defendant lied or was deceptive. *Id.* at 227. Evidence showed that defendant repeatedly provided a false name to the police. Thus, the instruction related to the defendant's false statements was appropriate. Therefore, since the instruction was valid, any objection by counsel would have been futile. Trial counsel's failure to make a futile objection does not constitute ineffective assistance of counsel, and this claim fails. *Horn*, 279 Mich App at 39-40.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering